No. 11-38

In the Supreme Court of the United States

JOHN E. WETZEL, et al.,
Petitioners,

v.

JAMES LAMBERT,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT IN REPLY

The Court of Appeals granted Lambert a new trial based on a claim of undisclosed evidence under Brady v. Maryland.[1] The disputed document, an unattributed note from internal police files, was improperly seized by Lambert's lawyers many years after his trial. The meaning of this document is hotly disputed – the Pennsylvania Supreme Court rejected Lambert's interpretation of it as "speculative" – but the Third Circuit did not even mention this disagreement.

In addition to its lopsided and incomplete analysis of the Brady issue, the Court of Appeals has issued a number of extraordinary orders in this case. This pattern has continued: A few days ago, the panel ordered that despite the pendency of this *Petition for Certiorari*, any extension of the retrial deadline must be conditioned on Lambert's immediate release from Pennsylvania's death row into the general prison population. This intrusion into the internal operations of the state prison system is unjustified, and beyond the powers defined by the habeas statute. See 28 U.S.C. §§ 2241, 2254.

1. The Petition presents an important question deserving of this Court's review.

The document at issue, a police "activity sheet," concerns Commonwealth witness Bernard Jackson. Early in the investigation, Jackson told police that he had committed this crime with two other men,

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[1] 373 U.S. 83 (1963).

Lambert (who he identified by his nickname, "Monk") and Bruce Reese; Jackson also confessed to about a dozen other armed robberies. According to the activity sheet, Jackson subsequently identified someone named "Lawrence Woodlock" as a "co-defendant" – the note does not say *in what case* Woodlock was a "co-defendant." The activity sheet also says that police showed Woodlock's picture to two witnesses in *this* case, who did not recognize him. The record contains no other references to "Lawrence Woodlock;" it seems likely that Jackson identified him as a participant in one of his many *other* robberies, and police simply confirmed that Woodlock had nothing to do with *this* case.

The Pennsylvania Supreme Court held that this "activity sheet" was ambiguous and its meaning speculative. The Third Circuit, however, did not even entertain this possibility, let alone explain why this conclusion had been unreasonable. And while the state supreme court also found that the disputed document would not have made any difference anyway, the Court of Appeals came to the opposite conclusion by re-characterizing and re-weighing the facts in a way that the state courts (or the jury) would hardly recognize.

Lambert's first and primary argument against *certiorari* is that there is "no important jurisprudential question" here; because the case is hopelessly "fact-bound," he says, it is not a good candidate for this Court's review. *Response* at 1. But the proper application of the habeas deference standard is indeed an important issue. This Court has not yet applied the deference standard to a Brady claim, and while such claims can be factually complicated, the issues here

are rather clear. For example, the Third Circuit's failure to *consider* the note's possible ambiguity is error by itself, as is the panel's reliance on non-existent evidence in its materiality analysis, or its cherry-picking of evidence in assessing Brady materiality. An opinion explaining these principles would be helpful to the lower federal courts, as cases involving similar issues continue to arise with regularity. See, e.g., Montgomery v. Bobby, Nos. 07-3882/3893 (6th Cir., Aug. 22, 2011) (split *en banc* decision denying relief on Brady issue arising from state capital case); LaCaze v. Warden, 645 F.3d 728 (5th Cir., June 29, 2011) (granting habeas relief on Brady claim), opinion amended on denial of rehearing *en banc*, --- F.3d ---, 2011 WL 3300677 (5th Cir., Aug. 2, 2011) (amending statement of materiality standard).

That a Brady claim can be bound up with facts – like claims of counsel's ineffectiveness – is no vaccination against *certiorari* review, especially in a case like this where the legal issues are plainly posed. Given the fundamental mistakes made by the Court of Appeals, and the remarkable tone of its opinion, this Court's attention is fully justified.

2. *As the state supreme court held, the meaning of the undisclosed evidence is unclear.*

Lambert's other main strategy is to assume, as did the Third Circuit, that the "activity sheet" is not ambiguous at all. For the most part, he speeds past any dispute, and aggressively refers to the note as a full-blown "statement" in which Bernard Jackson unambiguously identified Woodlock as the "third accomplice," or "third defendant." *Response* at 3, 6, 7 n.10, 16, 17. The disputed document does not use

these words, however, and that's the dispute: the state courts did *not* agree with this conclusory interpretation.

At one point, however – and unlike the Court of Appeals – Lambert does attempt to explain why he thinks the state court was wrong, and why it is likely that the activity sheet reflects a full-blown accusation that the mysterious "Lawrence Woodlock" was a participant in *this* case. *Response* at 16. This explanation is not particularly convincing: Lambert states only that the note "was written by the detectives investigating *these murders*, [it] references the police case numbers for *these murders*" (emphasis in original), and Woodlock's picture was shown to witnesses in *this* case (who did not recognize him). But none of that is in dispute – the question is why Woodlock's name was raised in the first place. If Woodlock was identified as a participant in one of Jackson's *other* robberies, and witnesses to *these murders* did not recognize his picture, that is not a Brady violation.

Perhaps sensing that the activity sheet is indeed ambiguous, Lambert spends most of his time on other arguments. He tries to reverse the burden of proof, accusing the Commonwealth of not presenting a "shred of evidence," *Response* at 16, that Woodlock was not involved in this crime. But this is *Lambert*'s claim; it is *Lambert's* burden to demonstrate that the state courts were unreasonable in denying relief.[2]

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[2] One reason there is no evidence about who "Woodlock" was, is that there has never been a hearing on the question. To be clear: the Commonwealth has always argued, and still believes, that the

The fact is, the language of the disputed document poses a problem for Lambert: The activity sheet says that Bernard Jackson called "Lawrence Woodlock" a "co-defendant," but that is an odd word to choose. *This* case had not even passed the preliminary investigation stage, so if Jackson really used the term "co-defendant" he was referring to another case. That would make sense, because Jackson had recently confessed to about a dozen robberies committed with a number of different people, some of whom he had earlier identified only by their nicknames. *Petition* at 3-4.[3] On the other hand, if Jackson did *not* use the word "co-defendant," what word *did* he use? Is the word "co-defendant" an invention of the police investigator, or the person who typed this note? Lambert's present counsel use all sorts of misleading words to describe Woodlock as a "collaborator" or "accomplice" or "participant," even though the note itself uses *none* of these terms. Perhaps the unidentified author of the note was similarly inventive – the activity sheet does not purport to be verbatim.

Brady claim should be denied without a hearing – the activity sheet is too speculative, and the state courts' rejection of the claim was reasonable. But if the courts disagree, and if it is otherwise lawful, the proper next step would obviously be a hearing, rather than an immediate grant of relief.

[3] Lambert states that Jackson confessed to committing a string of armed robberies *with Reese* (*Response* at 2-3 & n.3); he suggests that Reese was the only likely co-conspirator. But Jackson actually said he committed robberies with Reese *and several other people*, in various combinations, sometimes not involving Reese at all. *Petition* at 4 n.1.

3. The Third Circuit relied on a non-existent statement by Jackson.

In describing Jackson as a thoroughly unreliable witness, the Court of Appeals stated that Jackson first told police that the co-defendant, Reese, had admitted to being the shooter (rather than Lambert). App. 15. If this were true, it would be important, because this statement would amount to a prior inconsistent story regarding the identity of the shooter; but Jackson told police no such thing. *Petition* at 13-14. Lambert's argument in response is hard to fathom. He argues that Jackson *did* make such a statement, but on closer inspection, he only means that the panel was making an inference that was somehow "consistent" with the record. *Response* at 23-25. The panel, however, presented the existence of this inconsistent statement as undisputed fact, not an "inference." In any event, there is no evidence *at all* that Jackson ever made such a statement, inferential or otherwise.

In this portion of his *Response*, Lambert cites to two portions of the trial transcript, neither of which reflect any statement to police by Jackson in which he identified a shooter other than Lambert. First, Lambert quotes a portion of Jackson's trial cross-examination (where Jackson's use of the pronoun "he" created some question about whether Reese described *Lambert* as the shooter, or *himself* as the shooter). This was what the Third Circuit cited too, but it has nothing to do with any statement by Jackson *to the police*.[4] Second, Lambert briefly quotes a Detective

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[4] In any event, neither Lambert nor the Court of Appeals acknowledge that later in his testimony, Jackson stated he *did not*

who testified that Jackson "implicated one of the defendants" in his first statement, that is, Bruce Reese. *Response* at 24.

Lambert's use of the Detective's testimony to suggest that Jackson previously identified Reese as the *shooter*, is almost comically misleading. In his first statement to police, Jackson did indeed "implicate" Bruce Reese by name. In the very *same* statement, he told police that the *other* robber, who he identified only as "the dude," *admitted to being the shooter*. *Third Circuit Appendix* at 2080. Later, he told police that "the dude" was Lambert. Jackson did not tell police, in any of his statements, that Reese was the shooter. That is a fact. The Third Circuit misunderstood the record, and either Lambert misunderstands it as well, or he is deliberately misrepresenting it.

4. *The prosecutor's arguments about Jackson's consistency as a witness are beside the point.*

Lambert repeatedly asserts that *if* Bernard Jackson had ever identified "Lawrence Woodlock" as the third robber, this would have been important, because it would have undercut the prosecution's argument that Jackson was a consistent witness. *Response* at 17. But Lambert skips a step – this doesn't answer the *first* question of what Jackson actually said. Only if Jackson actually identified Woodlock as the third robber, does this materiality argument even become relevant. Further, if Jackson truly once did identify Woodlock as a co-conspirator in this case, then the

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mean that Reese identified himself as the shooter, and any other impression was a mistake. *Third Circuit Appendix* at 2184-86.

trial would have unfolded very differently, on both sides, as explained below.

5. *The prosecution could have used Lambert's own statement to police as a rebuttal to any suggestion that "Lawrence Woodlock" was involved in this crime.*

If Lambert had attempted to pin this crime on someone named Woodlock, then the prosecution could have responded with Lambert's own statement, where he admitted to police that he had been with Reese and Jackson on the night of the murder. (Lambert told police that he had been dropped off before the crime, and picked up again afterwards.) Lambert's story is hard to believe, and it especially fails to square with the "Woodlock" theory – Lambert would now have to convince the jury that Reese and Jackson dropped Lambert off, picked up Woodlock, murdered two people, dropped off Woodlock, and picked up Lambert again, all within a few hours, with Woodlock afterwards fading into oblivion – no one else having identified or mentioned him. It is not likely that a jury would have believed this. See *Third Circuit Appendix* at 2954 (Trial judge observes, "I can't imagine the jury swallowing that").

But the Third Circuit did not acknowledge that Lambert had even given a statement to police. Lambert tries to blunt the impact of this omission by insisting that the Commonwealth is wrong to discuss his statement *at all*. First, he says that the Commonwealth is changing its strategy, having argued at trial that Lambert's statement should be excluded from evidence. *Response* at 24-25. But *both* sides would be changing their arguments; this is what

happens when additional evidence surfaces after trial, which is one reason why courts must tread carefully in assessing the materiality of new evidence. Here, Lambert's lawyer only attempted to use his client's statement after Lambert was identified as the shooter by an eyewitness. In his view, apparently, the risks in using the statement (placing Lambert in the presence of the other gunmen that night) had become outweighed by the benefits (according to the statement, Lambert had been dropped off elsewhere). If Lambert tried to accuse a third party named "Lawrence Woodlock," the risks and benefits would shift again. Now, the statement's benefit to the *prosecution* (Lambert's own story places him in the presence of Reese and Jackson, *and* it undermines the Woodlock theory) would outweigh its risks (according to the statement, Lambert had been dropped off). Predicting such changes is a necessary part of materiality analysis. See Wong v. Belmontes, 130 S. Ct. 383, 386 (2009) (prejudice analysis must not only include trial evidence and disputed new evidence, but also "[other] evidence that almost certainly would have come in with it").

Lambert also complains that the Commonwealth did not discuss Lambert's police statement below until oral argument. *Response* at 24-26. But the Commonwealth has always argued that the activity sheet was not material; this Court has explained that a proper materiality analysis *must* take into account *all* relevant circumstances. United States v. Bagley, 473 U.S. 667, 683 (1985). Each fact is not a separate affirmative defense. On the contrary, it is a mistake to artificially separate the relevant facts and omit only some of them. See Kyles v. Whitley, 514 U.S. 419, 436

(1995) (for materiality purposes, evidence must be assessed collectively, not item-by-item).

6. The Commonwealth did not concede at oral argument its legal obligation to disclose the activity sheet.

Lambert dismisses as mere "quibbling" whether the Commonwealth conceded a legal obligation to disclose the disputed police note. *Response* at 17 n.17. This is not a "quibble." The Court of Appeals seemed to think that this supposed "concession" allowed it to avoid the question of what the note *meant*. On the contrary, the Commonwealth's point was only that the Philadelphia District Attorney's Office would now routinely disclose this kind of activity sheet. But this is no license to avoid a proper application of Brady and the habeas deference standard.

7. The other Brady claim is irrelevant.

Lambert also discusses an entirely different Brady allegation – that the prosecution did not disclose the full extent of its agreement with witness Bernard Jackson. *Response* at 3-4 & n.4. This is classic misdirection. The state trial court rejected this claim, finding *as a fact* that there was no undisclosed deal. Commonwealth v. Lambert, No. 8308-3432 (C.P. Phila, 2000) ("The Commonwealth informed the jury of all benefits that Jackson had received ... there was no further deal or agreement"). This finding is presumed correct in federal court, and indeed the district court also rejected this claim. Lambert v. Beard, 2007 U.S. Dist. LEXIS 54047, *31 (E.D. Pa.) ("there is no evidence, only speculation, regarding this claim"). The Commonwealth's *Petition for Writ of Certiorari*

concerns an entirely different issue. Lambert is simply trying to obscure the clear mistakes made by the Third Circuit.

8. The Third Circuit's treatment of this case remains disturbing.

Finally, Lambert defends the Third Circuit's heavy-handed approach to this case, and dismisses any complaints as "irrelevant." *Response* at 13-14. He insists, for example, that there was nothing wrong with the panel's "interim order" directing summary relief on an entirely different claim but deferring a full explanation, and in the meantime requiring Lambert's immediate release from death row. It is hard to imagine how this order – granting coercive relief on a request that was not even before the Court – did not prejudice the Commonwealth, especially because it was classified as *precedential*. In any event, the Third Circuit's actions, like its suggestion that the Commonwealth was wrong to prosecute Lambert for first degree murder in the first place, leave the distinct impression that the panel's approach to this case has been punitive and unconnected to any particular claim or argument.

Further, a few days ago, the Court of Appeals signaled that its approach to this case remains unchanged. On July 27 – after the Commonwealth filed the *Petition for Writ of Certiorari* – the panel ordered that any extension of the retrial deadline, even for a few months pending this *certiorari* petition, be premised on Lambert's *immediate* release from death row into the general prison population. The Commonwealth has asked for another stay of this latest order (this request is still pending), but once

again, the panel's determination to impose extraordinary and immediate conditions, despite the Commonwealth's right to review, suggest the need for this Court's intervention.[5]

CONCLUSION

For the reasons set forth above, and in the *Petition for Writ of Certiorari*, petitioners request that this Court grant the petition for writ of *certiorari*.

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[5] In its *Petition*, the Commonwealth pointed out that the Third Circuit routinely reverses Pennsylvania capital convictions. *Petition* at 18-21. Lambert responds that the Third Circuit's reluctance to allow executions is confined to Pennsylvania. *Response* at 21-22. That is not exactly comforting. These cases arose in counties all over the Commonwealth, involving different prosecutors, judges, defense lawyers, and police. It is hard to believe that all were nevertheless contaminated by an atmosphere of error that abruptly stops at the Delaware border.

Respectfully submitted,

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